Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

H.K. PORTER COMPANY, INC.,

Petitioner,

v.

TRANSAMERICA INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. In this diversity case, did the United States District Court for the Western District of Pennsylvania correctly interpret Pennsylvania law in instructing the jury to determine whether, in a case involving a lost insurance policy, it had been proven by clear and convincing evidence that the lost policy contained a term providing product liability bodily injury coverage without aggregate limitation?

II. Did the District Court abuse its discretion in admitting into evidence certain National Bureau Underwriting Manuals where the testimonial evidence, as well as the manuals themselves, clearly supported a finding that the manuals were authentic?

LIST OF PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Respondent Transamerica Insurance Company was the defendant below and is a nationwide insurance company. Pursuant to Rule 28.1 of the Rules of this Court, respondent states that its parent corporations are Transamerica Corporation, Transamerica Insurance Corporation of California, and Transamerica Insurance Group. Respondent's affiliates or subsidiary corporations, apart from wholly-owned subsidiaries, are River Thames Insurance Company Limited and Industrial County Mutual Insurance Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Judgment Order of the United States Court of Appeals for the Third Circuit.

STATEMENT

On February 27, 1984, H.K. Porter Company, Inc. (Porter) filed a declaratory judgment action against Transamerica Insurance Company (Transamerica) seeking nearly unlimited product liability bodily injury coverage under insurance policies

issued in the years 1952 and 1953. As the basis for the action, Porter alleged that it has been named as a defendant or third-party defendant in numerous lawsuits seeking damages for asbestos-related injuries. Porter also alleged that in a large number of the cases, its liability is predicated on the fact that it is the legal successor to Thermoid Company (Thermoid), the alleged insured in this case. As a result of the lawsuits, Porter began an intensive search for evidence of any insurance covering the claims against it as the successor to Thermoid. After considerable efforts, Porter located a file in a Consolidated Rail Corporation warehouse labelled "Thermoid Corporation." The file contained three certificates of insurance and correspondence relating to the certificates.[1] The certificates and correspondence evidence a transaction whereby the Pennsylvania Railroad agreed to lease to Thermoid certain property adjacent to Thermoid's plant for use as an employee softball field.[2]

The three certificates describe blanket liability insurance policies covering the years 1952-53, 1953-54, and 1954-55 which Manufacturers Casualty Company (Manufacturers) issued to Thermoid. Transamerica's alleged liability in this case was predicated on its status as the corporate successor to Manufacturers. Typewritten on the certificates describing policies covering the years 1952-53 and 1953-54 is the phrase "including products." In addition, in spaces specifically provided for the

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[1] A certificate of insurance is not an actual insurance policy or even a portion of an insurance policy. It does not and is not intended to convey all of the terms of the insurance policy. Rather, a certificate of insurance is a document an insurer typically provides to a third-party as evidence of insurance.

[2] Because lease of the softball field was at issue, the correspondence related to whether the certificates indicated Thermoid had obtained coverage for contractual liability potentially arising out of the lease.

purpose, the certificates indicate the 1952 and 1953 policies provided coverage for product liability bodily injury claims up to $50,000 per person and $100,000 per accident. Neither of these two certificates describing the policies, however, indicates the aggregate amount of coverage provided for product liability bodily injury claims. Neither of these two certificates contains a space in which such an aggregate could be entered.[3]

Based upon information contained in the certificates, Transamerica and Porter were able to identify and stipulate to the forms or specimens used to create the policies at issue. By so stipulating, the parties agreed that the actual policies, although lost, contained the following language regarding aggregate limits on product liability bodily injury coverage:

> With respect to damages arising out of the possession, consumption, handling or use away from premises of the Insured, of any merchandise or product manufactured, sold, handled or distributed by the Insured or out of operations completed by or for the Insured and away from premises of the Insured, the liability of the Company, subject to the above limits for each person and each accident, shall be limited, in respect of all accidents occurring during each twelve (12) months of the Policy Period, in the aggregate to $ for bodily

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[3] In contrast, the form used to complete a third certificate, describing a policy covering the 1954-55 period, contains a specific line on which to enter a product liability bodily injury coverage aggregate limit. Because that line was completed in the amount of $250,000, Transamerica and Porter agreed the aggregate limit on product liability bodily injury coverage under the 1954-55 policy was $250,000. Moreover, because Transamerica has made $250,000 in indemnity payments to Porter under the third policy, coverage under the policy is not in dispute.

injury including death at any time resulting therefrom and to $ for property damage.

On December 5, 1986, the district court issued a pretrial order dividing trial of the case into three phases. Phase I was to determine "[t]he existence and material provisions of the insurance policies, including limits of liability, if any." Phase II, if necessary, was to involve questions concerning "[t]he application of the insurance contracts to the asbestos-related bodily injury claims." Phase III, if necessary, was to involve "calculation of damages under Porter's breach of contract action and the rendering of declaratory relief."

On February 13, 1989, jury trial on the Phase I issues began. At trial, Porter's testimonial proof essentially consisted of two witnesses. Porter offered the first, Robert Acklen, as an expert who had experience as a claims adjuster, salesperson, and lecturer on the topic of insurance. Acklen had never sold any policies for Transamerica and had never heard of Manufacturers prior to being retained by Porter. Accordingly, Acklen based his testimony solely on his review of the documents in the case. Based on that review, Acklen concluded that in the absence of an aggregate limit noted on the certificates, no aggregate would apply to claims arising under the policies. Porter also introduced the testimony of Fred Corcoran, a claims manager for Manufacturers from 1949 until he was fired in 1955. Corcoran testified that he had seen liability insurance policies issued by Manufacturers with product liability bodily injury coverage where there was no aggregate stated. Corcoran could not, however, recall the identity of any insureds who had allegedly purchased such policies.

In contrast, Transamerica presented the testimony of Jack String, the underwriter employed by Manufacturers in the early 1950's who was responsible for writing the coverage which Thermoid purchased, and Lee Walton, the agent responsible for the policies issued to Thermoid. String testified that he remembered preparing and issuing the policies. In addition, he testified that although he could not recall specific details, he had never rated or seen a policy providing product liability bodily injury coverage without an aggregate limit. Further, String testified that because all of the published rates in the insurance industry in the 1950's were predicated on the existence of an aggregate limit, it would have been impossible to issue a policy covering product liability bodily injury without an aggregate limit.

Consistent with String, Walton testified that all of the Manufacturers policies he ever sold covering product liability bodily injury claims contained an aggregate limit. Moreover, Walton testified that while he could not recall specific provisions of the policies at issue, if he had in fact sold Thermoid product liability bodily injury coverage without aggregate limitation, he would have remembered the event because it would have been so unusual that it would have been the talk of the insurance industry.[4]

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[4] Transamerica also introduced the expert testimony of Ronald Almquist. Mr. Almquist had served as an underwriter for St. Paul Fire and Marine Insurance Company from 1955 to 1984. During that time, Almquist reviewed thousands of insurance policies from the early 1950's. Almquist testified that of the many policies he had reviewed, he had never seen a policy providing product liability bodily injury coverage without an aggregate limit on such coverage. In addition, Almquist testified that industry practice in the early 1950's required an aggregate limit on product liability bodily injury coverage and that if the "per accident" limit were greater than $25,000, the aggregate limit would be the same as the "per accident" limit.

At the close of the trial, the district court, applying state law, instructed the jury to determine whether it had been proven by clear and convincing evidence that either of the policies contained a term providing product liability bodily injury coverage without aggregate limitation.[5] The jury returned a verdict in favor of Transamerica, finding that the policies did not provide coverage without aggregate limitation. On February 27, 1989, the district court entered judgment in accordance with the jury verdict. Porter appealed the judgment to the United States Court of Appeals for the Third Circuit. By Judgment Order dated September 26, 1989, the Third Circuit summarily affirmed the judgment of the district court. Thereafter, Porter petitioned the Third Circuit for rehearing or rehearing en banc. On November 9, 1989, the Third Circuit denied Porter's petition. Porter now seeks review of the Third Circuit's summary affirmance.

REASONS FOR DENYING THE PETITION

This case does not, as Porter suggests, present "an appropriate vehicle by which this Court can begin to address the asbestos litigation logjam." Porter's Petition for a Writ of Certiorari at 9. To the contrary, this case presents a narrow issue of state law as to the proof required of a party seeking to recover under the terms of a lost insurance policy.[6] The district court, applying well-settled Pennsylvania law, properly instructed the jury to

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[5] The district court's bench ruling concerning the burden of proof is reprinted in the Appendix to this brief at 1a-5a. In addition, the special verdict returned by the jury is reprinted in the Appendix at 6a.

[6] In point of fact, Porter's contention that this case presents an appropriate vehicle for this Court to address issues relating to asbestos litigation is belied by the fact that, just prior to trial, Porter moved the district court to direct neither party to raise the nature of the claims for which it sought coverage, i.e., asbestos claims. Transamerica did not oppose the motion.

determine whether it had been proven by clear and convincing evidence that the lost policies provided product liability bodily injury coverage without aggregate limitation. Accordingly, because the lower courts correctly applied state law relating to lost instruments, this case does not present the exceptional circumstances under which this Court should review the lower courts' determination of a question of state law.

I. THE DISTRICT COURT, APPLYING STATE LAW, CORRECTLY DIRECTED THE JURY TO DETERMINE WHETHER IT HAD BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT THE LOST POLICIES PROVIDED PRODUCT LIABILITY BODILY INJURY COVERAGE WITHOUT AGGREGATE LIMITATION.

Notwithstanding Porter's contentions concerning the growth and volume of asbestos litigation and the effect of such litigation on state and federal courts, *see* Petition for Writ of Certiorari at 9-14, this case involves a very narrow question of state law concerning the proof required of a party seeking to recover under a lost insurance policy. Specifically, Porter contends that insurance policies purchased in 1952 and in 1953, which are now lost, contained a term providing it with nearly limitless coverage for product liability bodily injury claims. In an attempt to meet its burden under state law, Porter stipulated, on the basis of available specimen or form policies, that the lost policies contained a term relating to the aggregate limit of product liability bodily injury coverage afforded under the policies. That term, however, contained a blank to be completed in the actual policies by filling in the amount of the aggregate limit.

As the master of its claim, Porter could have argued that the blank relating to the aggregate limit term contained any figure. Instead, Porter chose to argue that the blank in the policies was

intentionally left empty and that, therefore, it enjoyed product liability bodily injury coverage without aggregate limitation. Porter's decision to argue that it enjoys nearly limitless coverage does not, however, alter the applicable state law and require Transamerica to prove otherwise. Rather, the lower courts properly interpreted the applicable state law to require Porter to establish by clear and convincing evidence the amount of coverage the lost policies afforded.[7]

Under the clear Pennsylvania law applied by the lower courts, a party seeking to recover under a lost instrument must prove the contents of the instrument by clear and convincing evidence.[8] *See, e.g., Keene Corp. v. Insurance Co. of North America*, 1981 WL 1753 (D.D.C. Jan. 30, 1981) (Westlaw, DCT database) (lost insurance policy); *Wheatcroft v. Albert Co.*, 407 Pa. 97, 180 A.2d 216 (1962) (lost deed); *In re Greggerson's Estate*, 344 Pa. 498, 25 A.2d 711 (1942) (lost note). Thus, Porter must prove all of the terms of the lost policies by clear and convincing evidence. Porter may not prove only selected portions of the policies, and shift the burden to Transamerica to prove the remaining terms.

In *Vanhorn v. Munnell*, 145 Pa. 497, 22 A. 985 (1891), one of the earliest Pennsylvania cases concerning proof required to recover under a lost document, the plaintiff brought an action

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[7] Porter contends that the lower courts' decisions placed on it the burden of proving a negative — the nonexistence of a limitation on coverage. Petition for Writ of Certiorari at 14-16. Yet, as the proponent of nearly limitless coverage, Porter was obliged to prove such coverage.

[8] In its petition, Porter states that "[t]he burden of proof issue is controlled by state law," and that either Pennsylvania or New Jersey law applies. Petition for Writ of Certiorari at 15 n.16. In addition, Porter states that the potential sources of state law in this action, Pennsylvania and New Jersey, are identical. *Id.*

for specific performance of a lost instrument that had been drafted some twenty-three years prior to trial. At trial, the plaintiff called as a witness the person who drafted the lost document at issue. The witness testified that he never saw the document after he drafted it, but that "[t]here are some things that I know and some things that I do not recollect." *Id.* at 985. Moreover, when questioned whether the document at issue contained certain specific terms, the witness testified that it may have, but that such terms would have been immaterial to the witness. *Id.* at 986. The witness also testified that he recalled only "the principal points." *Id.* Based on the testimony, the Pennsylvania court refused to enforce the lost instrument stating that "[f]or specific performance . . . it is indispensable to prove, by the most clear and indisputable evidence, the precise terms of the agreement. . . . And this necessarily means the whole agreement." *Id.* at 985.

Thus, under the clear Pennsylvania law dating back to *Vanhorn*, Porter may not prove only a portion of the lost policies. The specimen or form policies which the parties stipulated served as a model for the policies here at issue indisputably contained a term relating to the aggregate limit of product liability bodily injury coverage. As the lower courts ruled, under Pennsylvania law, proof of the contents of the lost policies necessarily requires proof of the contents of the term relating to the aggregate limit.

In this light, Porter's argument that "[u]nder the logic of the lower courts' rulings, the proponent of a lost insurance policy may be required to prove the nonexistence of whatever exclusions, exceptions, and coverage restrictions that the insurer may claim," *see* Petition for Writ of Certiorari at 17, is simply irrational and ignores the facts of the case. Rather, as a party

seeking to recover under a lost instrument, Porter had to prove "the precise terms of the agreement. . . . And this necessarily means the whole agreement." *See Vanhorn*, 22 A. at 985. Porter stipulated that the policies at issue contained a term relating to the aggregate limit of product liability bodily injury coverage. Under Pennsylvania law, therefore, Porter had the burden of proving that the term provided the nearly limitless coverage it claimed.

In addition, the general rule Porter cites that "[t]he insurer bears the burden of proving the applicability of policy limitations and exclusions in order to avoid an adverse judgment after the insured has sustained its burden and made its *prima facie* case," *see* Petition for Writ of Certiorari at 15, citing 19 G. Couch, *Couch on Insurance 2d* §79: 315 (rev. ed. 1983), is fully consistent with the decisions of the lower courts and does not require Transamerica to prove the coverage term at issue in this case. Application of the term relating to the aggregate limit of product liability bodily injury coverage afforded under the lost policies cannot be at issue unless and until the aggregate limit terms have been proved. The general rule does not shift to Transamerica the burden of proving selected terms of a lost policy. Rather, where the policy is lost, the insured, as part of its *prima*

facie showing, must establish the policy terms, including those terms setting forth policy limits.[9]

The district court's pretrial order recognized as much, stating that Phase I of the action was to "determine the existence and material provisions of the insurance policies, including limits of liability, if any." In contrast, Phase II of the action, had it been necessary, was to have involved questions concerning "[t]he application of the insurance contracts to the asbestos-related bodily injury claims." Thus, pursuant to the pretrial order, had Porter succeeded in proving the aggregate limit term in the policies, that term as well as other terms and conditions in the policies would have been applied to the asbestos injury claims in Phase II.[10]

In this light, the authorities Porter cites as setting forth the general rule that the insurer bears the burden of proving the applicability of policy exclusions are inapposite because they

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[9] Even if the policy were not lost, Porter would still bear the burden of showing that its claim falls within the coverage of the policy. Thereafter, if necessary, Transamerica would have been allowed to establish that Porter's coverage, if such coverage had been established, was exhausted. As a practical matter, however, if Porter had proved the contents of the aggregate limit terms, whether by producing the actual policies or by sufficient proof of the contents of the lost policies, issues relating to exhaustion of the limits would have been clearly defined because the parties stipulated that Transamerica had made $200,000 in indemnity payments under the policies.

[10] For example, Phase II would have involved a determination of a number of affirmative defenses, including late notice and exhaustion of policy limits. Transamerica has taken the position that even if the policies at issue provided coverage without aggregate limitation, the "per accident" limit contained in the policies would bar further indemnity payments because there was only one accident involved in the decision to manufacture products containing asbestos. *See Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 771-73 (E.D. Pa. 1989).

address the application and interpretation of exclusions set forth in known and admitted policies rather than proof of a term in a lost policy setting forth the amount of coverage. For example, *Mattocks v. Daylin, Inc.*, 452 F. Supp. 512 (W.D. Pa. 1978), cited in Petition for Writ of Certiorari at 15, involved the question whether the insurer had a duty to defend its insured despite a known exclusion contained in a "vendor's endorsement" to the policy. Similarly, *Morie v. New Jersey Manufacturers Indemnity Insurance Co.*, 48 N.J. Super. 70, 137 A.2d 41 (1957), cited in Petition for Writ of Certiorari at 15, involved the question whether a clause excluding auto coverage for damage caused by "wear and tear, freezing, mechanical or electrical breakdown or failure" applied to bar recovery for the insured's claims. In both *Mattocks* and *Morie*, the policies were not lost and their terms were available to the court.[11]

In contrast to the inapposite authorities Porter has cited, case law in Pennsylvania and elsewhere addressing disputes relating to alleged coverage under lost policies purportedly covering asbestos-related claims solidly supports the rulings of the lower courts. That law requires the party seeking to recover under a lost policy to prove by clear and convincing evidence the terms of the policy, including the aggregate limits on coverage. In *Greene Tweed & Co. v. The Hartford Insurance Co.*, Nos. 2953, 3098 (Pa. Super. 1988), reprinted in Appendix at 7a-11a, Greene Tweed sought a declaration that certain lost insurance policies

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[11] Similarly, *Miller v. Boston Insurance Co.*, 420 Pa. 566, 570, 218 A.2d 275, 277 (1966), cited in Petition for Writ of Certiorari at 15, involved application of a known policy exclusion. The case turned on whether an exclusion in a "Jewlers' Block Policy" barring recovery for "[u]nexplained loss, mysterious disappearance, or loss or shortage disclosed in inventory," applied to bar recovery for loss of a ring. The case does not address the proof required to recover under a lost policy.

would have provided coverage for an action brought against it seeking recovery for asbestos-related injuries. The Pennsylvania Superior Court, applying Pennsylvania law, affirmed the trial court's finding that Greene Tweed failed to meet its burden of proving the existence of the lost policies by clear and convincing evidence. In addition, the court affirmed the trial court's dismissal because Greene Tweed failed to produce "evidence from which [the trial court could] ascertain the terms of coverage, or whether there are applicable exclusions." *Id.* at 5.

Similarly, in *Keene Corp. v. Insurance Co. of North America*, 1981 WL 1753 (D.D.C. Jan. 30, 1981) (Westlaw, DCT database), a case applying Pennsylvania law in a situation similar to this case, the plaintiff claimed that it was insured under lost policies covering the period from 1948 to 1959. The plaintiff introduced into evidence the standard form policies used during the period, as well as other evidence as to the contents of the policies. The court found that the plaintiff failed to carry its burden of proof, stating:

> Basically, [the plaintiff] has shown that the standard form CGL policies sometimes make products coverage mandatory and that [the insurer] used standard CGL policies. [The plaintiff] argues that its showing shifts the burden of proof to [the insurer] to show that products coverage was explicitly excluded by a separate exclusionary endorsement. . . . The Court disagrees. Irrespective of the form used, product coverage . . . was indicated by a separate premium charge for products liability and an aggregate limitation on the declarations page of a policy. [The plaintiff] has failed to

> offer a declarations page showing products coverage was included.

Id. at 2.

Finally, in *UNR Industries, Inc. v. Continental Insurance Co.*, 682 F. Supp. 1434 (N.D. Ill. 1988), *amended without relevant change*, 1988 WL 121574 (Nov. 9, 1988), the plaintiff sought coverage under a lost policy for asbestos-related claims. The insurer denied the policy contained product liability coverage. At trial, the district court instructed the jury that, pursuant to Illinois law, the plaintiff had to prove by clear and convincing evidence:

> (1) the policy period; (2) that the policy provided liability insurance for bodily injury, sickness or disease caused by accident; (3) that products hazard insurance coverage was provided; and (4) the limits of the coverage and aggregate products limits, if applicable.

Id. at 1442. Moreover, in a post-trial motion, UNR argued to the court that the instruction improperly required the insured to prove an exclusion from coverage. The court rejected the argument, stating:

> UNR was not required to prove that there was no exclusion of the products hazard from the . . . policies. Rather, it was required to prove the contents of the lost policies, including any exclusion. . . . UNR was not entitled to a presumption that coverage was provided or to an instruction shifting the burden to prove an exclusion to National Surety.

Id. at 1447-48.

In sum, the case law from Pennsylvania, as well as case law from other jurisdictions, is clear that Porter, as a party seeking to recover under lost insurance policies, had to prove the terms of the lost policies. Moreover, proof of the terms of the lost policies required proof of the amount of the aggregate limits which the parties stipulated were contained in the lost policies.

In addition to the case law directly on point, the aggregate limitation on coverage is, as the district court ruled, a term and condition of the policy that the insured must prove in order to establish coverage rather than an exclusion from coverage. In so ruling, the district court examined the paragraph of the specimen policy containing a blank for the aggregate limit term, stating:

> Paragraph 4, is of course . . . headed limits of liability. And that provides for a per person limit, a per accident limit, and also, with regard to products liability bodily injury coverage, for an aggregate limit. And that, I believe [is] a factor that must be established by the plaintiff, in order to recover under this policy, that's not an exclusion by the very terms of the policy . . . the aggregate limit is set forth as a limitation of liability. Now, if there was not a blank in that policy for aggregate limits for products liability, then I think you might have a different situation. . . . But you are faced with a contract which sets forth that it will pay within the limits of liability of the policy, and then the limits of liability are very clearly defined and set forth in paragraph . . . 4 of that policy. And I don't know how we can call that an exclusion.

District Court Ruling, Appendix at 4a.[12]

Ignoring the clear state law to the contrary, Porter argues that public policy will somehow be served by review of the lower courts' decisions. Yet, Porter's argument ignores the fact that it has waited decades to bring its claim that it enjoys nearly limitless coverage. During that time, the relevant policies have been lost, witnesses have died, and other witnesses have lost their ability to remember important events. But for Porter's delay and failure to produce the policies, this dispute may have been avoided. To reward Porter by presuming it enjoyed nearly unlimited coverage under the lost policies can only serve to invite assertion of fraudulent claims.

It is for precisely this reason that the law of Pennsylvania requires parties seeking to recover under a lost instrument to prove the contents of the lost instrument by clear and convincing evidence. Parties who reduce their agreements to writing are entitled to expect a high degree of safety and reliability. As Chief Justice Marshall stated long ago:

> When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the document itself. The safety which is expected from them, would be much impaired, if they could be established upon uncertain and vague impressions made by

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[12] In addition, the district court compared the aggregate limit terms to the per person limits and per accident limits on coverage which counsel for Porter conceded it must prove. The district court found that, although each of the aforementioned terms limits coverage insofar as the insured must show that its claim falls within the coverage afforded under the policy, the terms are not exclusions because they serve to initially define the coverage afforded under the policy. District Court Ruling, Appendix at 2a-3a.

> conversation antecedent to the reduction of the agreement.

Tayloe v. Riggs, 26 U.S. (1 Pet.) 591, 600 (1828).

In sum, as the party seeking to recover under a lost insurance policy, Porter had to prove by clear and convincing evidence that the coverage it claimed was indeed afforded it under the terms of the lost policies. As part of that proof, Porter stipulated that the lost policies contained terms relating to the aggregate limit of product liability bodily injury coverage. The lower courts, applying state law, properly instructed the jury to determine whether the policies contained an aggregate limit term affording Porter the nearly limitless coverage it claimed.

II. THIS CASE DOES NOT PRESENT THE EXCEPTIONAL CIRCUMSTANCES UNDER WHICH THIS COURT REVIEWS FEDERAL COURT RESOLUTION OF QUESTIONS OF STATE LAW.

Despite the hyperbole in Porter's petition relating to "the asbestos litigation logjam," *see* Petition for Writ of Certiorari at 9-13, Porter in fact seeks review of the lower federal courts' decision on a very narrow issue of state law. Yet, absent an exceptional case, this Court will not review the lower federal courts' resolutions of questions of state law. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). More recently, in *Haring v. Prosise*, 462 U.S. 306 (1983), this Court emphasized "that, standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Id.* at 314 n.8.

Moreover, even if certiorari is granted for another reason, this Court will defer to the determinations of lower federal courts on issues of state law unless the lower courts' determination is

shown to be clearly wrong or unreasonable. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985); *see also Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985); *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976). Such deference is based on this Court's recognition that "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett*, 472 U.S. at 500.

Faced with overwhelming authority that this case does not present the exceptional circumstances supporting this Court's review, Porter seeks to portray the decision of the district court and the summary affirmance of the Court of Appeals as so great a deviation from applicable state law as to effectively result in creation of a federal common law rule. Yet, review of the district court's bench ruling, reveals that the district court applied well-settled state, and not federal, law. *See* District Court Ruling, Appendix at 4a-5a. Applying that law, the district court properly instructed the jury to determine whether the policies contained aggregate limit terms affording Porter the nearly limitless coverage it claimed and the court of appeals summarily affirmed that determination. Accordingly, this case does not present the exceptional circumstances supporting this Court's review of the decisions of the lower federal courts concerning matters of state law.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE CERTAIN NATIONAL BUREAU UNDERWRITING MANUALS.

Porter seeks review in this Court to determine whether the district court abused its discretion in admitting into evidence

copies of manuals used by underwriters in the insurance industry during the early 1950's in writing product liability coverage. The testimonial evidence and the manuals themselves, however, provide more than sufficient evidence of authenticity to support their admission. Moreover, even assuming for the sake of argument that the district court erred in admitting the manuals, such error was clearly harmless and does not warrant supervisory review.

During the 1940's and 1950's, the National Bureau of Casualty Underwriters (National Bureau) published underwriting manuals that virtually all insurance companies in the United States used. These manuals provided rules for writing certain coverages and guides for setting premiums.[13] At trial, Transamerica introduced underwriting manuals in effect during the time periods of the relevant policies. Porter objected to introduction of the manuals arguing that they had not been properly authenticated pursuant to Federal Rule of Evidence 901.

Rule 901 states that authentication requirements are satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Applying the rule, the Third Circuit has noted that,

> [t]he burden of proof for authentication is slight. "All that is required is a foundation from which the fact-

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[13] The National Bureau of Casualty Underwriters later became known as the Insurance Services Organization. One of the "alterations" about which Porter apparently complains is the placement of an "ISO" stamp in the margin of the manuals, indicating that they were obtained from the Insurance Services Organization. Porter, however, did not object to the stamp at the time of trial and, therefore, should not be heard to raise the objection in this Court.

> finder could legitimately infer that the evidence is what the proponent claims it to be."

Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986), quoting *McQueen v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985), quoting *In re Japanese Electronics*, 723 F.2d 238, 285 (3d Cir. 1983), *cert. denied on other grounds*, 471 U.S. 1002 (1985).

Against this backdrop, the evidence is clearly sufficient to support the district court's decision to admit the manuals. First, the testimony of Ronald Almquist indisputably identified the manuals as National Bureau Underwriting manuals from the early 1950's. Almquist testified that as an underwriter working in the 1950's, he relied on a daily basis upon manuals like those introduced. Moreover, when presented with the manuals, Almquist readily identified them as copies of those promulgated by the National Bureau in the 1950's. Finally, Almquist testified that from his work as an underwriter, he was "very familiar" with the material contained in the manuals. Thus, the record is clear that Almquist sufficiently authenticated the manuals.

In addition to Almquist's testimony, the manuals were self-authenticating. Federal Rule of Evidence 901(b)(4) states that a matter may be self-authenticating simply by its "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances." The manuals are printed and contain distinctive type and charts. The cover page of one of the manuals (Trial Exhibit H) identifies it as a "Manual of Liability Insurance—Rules and Rates." The second page of the manual identifies it as "Product Liability Manual" and states that it was "Issued by National Bureau of Casualty Underwriters, 125 Maiden Lane, New York, N.Y.

10038." Thus, the unique nature and appearance of the manuals, combined with Mr. Almquist's identifying testimony, leaves no doubt as to the authenticity of the manuals.

Porter contends that Almquist's testimony is insufficient to authenticate the manuals because he could not testify as to their source or maintenance. The manuals were not, however, offered as the actual manuals Almquist personally used in the 1950's. Rather, they were offered as copies of manuals in use by underwriters across the country during the early 1950's. Thus, it is immaterial that Almquist could not identify the source of the manuals or establish a "chain of custody," given that Almquist recognized the manuals as authentic on sight.[14]

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[14] Similarly, Porter contends that the manuals were not properly authenticated because notations were added to reflect the effective dates of the manuals, and the manuals were incomplete. With respect to the dates, the manuals were in looseleaf form. Therefore, each page of the manuals was sequentially paginated and separately dated. For example, the pages relating to aggregate limits for product liability coverage in Trial Exhibits H and I are dated "Effective April 17, 1950." The similar page in Trial Exhibit J bears the date "Effective December 15, 1952." Thus, effective dates of the rules contained in the manual are obvious from each page in the manuals.

Concerning the completeness of the manuals, at trial Porter introduced several pages relating to exceptions to the material in the manuals required by various states. Notwithstanding this fact, Almquist testified that the exhibits were complete with respect to the general underwriting rules contained in the bodies of the manuals. In addition, Almquist testified that exception pages never changed the general rules contained in the bodies of the manuals but simply provided for minor state-by-state variations in classifications and rates. Finally, Almquist testified that the exception pages never changed the rule that policies providing product liability coverage must contain an aggregate limit on such coverage and that the aggregate limit was, as a general rule, the same as the "per accident limit." Thus, while the manuals may not have contained every conceivable page that they could have contained, any missing pages are immaterial and do not affect the admissibility of the manuals.

Finally, even assuming the district court erred in admitting the manuals, such error was clearly harmless. Rule 103(a) of the Federal Rules of Evidence provides that error in admitting or excluding evidence may be grounds for reversal only if the error affected a "substantial right of the party." Instances in which the evidence is merely cumulative, or does not relate to a material fact, are generally found to involve harmless error. 1 Weinstein & Berger, *Weinstein's Evidence* 103-56, 103-76, 103-77 (1989). The record in this case clearly shows that any error in admitting the manuals was harmless because the evidence contained in the manuals was merely cumulative of other overwhelming evidence Transamerica introduced.

In this regard, the testimony of the only witnesses with personal knowledge of the lost policies was unanimous that the policies provided for an aggregate limit on products coverage. For example, Lee Walton, the insurance agent for Thermoid, testified that he remembers the Thermoid account and that he never sold a policy that did not have an aggregate limit on product liability coverage. Walton also testified that industry practice in the 1950's was to always impose an aggregate limit on products coverage and that in cases where the per accident limit was greater than $25,000, the aggregate limit would be the same as the "per accident" limit.

Similarly, Jack String, the underwriter at Manufacturers who recalls writing the policies, testified that in over 30 years in the insurance industry he never wrote a policy without an aggregate limit for products liability coverage. Finally, Ronald Almquist testified that it was standard industry practice to always write products liability coverage with an aggregate limit and that the standard practice was that the aggregate limit was the same as the "per accident limit." In light of this testimony, the

manuals simply corroborated the substantial testimony of Walton, String and Almquist. Thus, admission of the manuals, even if in error, was clearly harmless.

In sum, the district court did not abuse its discretion in finding that Transamerica provided sufficient evidence of the authenticity of the underwriting manuals to support their introduction into evidence. Moreover, any error by the district court in admitting the manuals was harmless because the manuals merely corroborate overwhelming testimonial evidence that Transamerica introduced.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

THE COURT: Well, there is a difference. One policy was a year later.

MR. KANE: That's true.

THE COURT: And the jury could conclude, I suppose, that maybe for the second policy the fact that they're continuing to show in their certificates of insurance that there was no aggregate limit that this indicated that there was in fact none. There's a difference. In any event, I'm going to submit it to them with two questions. And you can argue to them that the evidence is the same.

Now, if I can read the notes that I scribbled yesterday, I'll try to indicate my reasons on the record. First of all, the plaintiff has submitted authority in support of the proposition that the matter of limits of liability or aggregate limits of liability constitute exclusions which the defendant must prove in order to avoid liability. The principal case that is cited is the Emons case which is the New York case. That case, the posture of that case was a motion for summary judgment. And the Court, in denying the motion for summary judgment, found that there was an issue of fact remaining and simply stated that the limitation of liability placed in question by the — by Liberty may arguably be considered such an exclusion, such an exclusion being an exclusion which, under New York law, the insurance company had the burden to establish. And then indicated that the Court would deny the motion for summary judgment.

Well, that is, I think, a rather weak statement as to whether an exclusion — or whether the aggregate limits is in fact an exclusion. Under the policy state that it arguably can be considered

exclusion is a far cry from saying — and from a holding that it was in fact an exclusion. The Burroughs case which cites the Emons case, which was also cited by the plaintiff as one of its principal cases is even, I would say, weaker because they point to the Emons case and then they — with regard to the question of limits of liability, and then they conclude, but that's irrelevant because what we're determining here is whether or not the insurance company owed a duty to defend, and that does not depend upon the limits of liability.

Now, we might question that, and I guess in this case somewhere along the line we're going to have to rule on that, or may, but that, again, was a far cry from an endorsement and a following of the Emons case.

Now, reason and logic, I think, support the other position. We have a lost instrument. The general rule is that the one seeking to recover damages on its contract has the burden of proving that the party from whom they seek to recover rights under the contract owes those rights. And that's true where the contract is lost or not lost. And here we have a lost written document, and it seems to me rather clear that you must prove that there is — there remains a contractual duty owed to you by the insurance company. -

Well, what difference is there between a per person limit and a per accident limit and aggregate limit? If the policies provide for those, one would think that the person claiming a right to recover must show that the recovery — that the claim comes within the limits set by the policy for per person, limits set by the policy for per accident. Where the policies provide also an aggregate limit, or a space for aggregate limits as the specimen policies which the parties have stipulated were the specimen

policies of the manuscript policies that were issued in this case, then it it seems to the Court logical to require the person asserting the right to recover fill in the blanks.

Counsel for the plaintiff concedes that they must show the per person and per accident limits, but attempts, as counsel must, to draw a distinction between the aggregate limits, and made the argument, oral argument the other day, that this is in the form of an exclusion because it is the defendant's responsibility to show that the claim, which otherwise would be covered by the policy is — has exceeded the policy limits. Well, I don't understand why that should be. You admit that you have the responsibility to demonstrate that your claim comes within the chronological limitations of the policy, what — why would you not also have the responsibility to demonstrate that it comes within the monetary limitations of the policy or that there were no monetary limits?

There's another reason why I believe that the attempt to characterize the aggregate limits here as exclusions won't work. The policy that you have stipulated to as being the manuscript policy — I need the copy of the manuscript policy. It would be in the third —

THE CLERK: One of these two?

THE COURT: All right, this is fine. Provides in Roman numeral 1. In consideration of the payment of an advance premium of blank and subject to a minimum premium of blank and to the limits of liability, exclusions, conditions and other terms of the policy, the company agrees to pay on behalf of. Well, the policy itself distinguishes between limits of liability and exclusions.

Paragraph 4 is, of course — Roman numeral 4, is headed limits of liability. And that provides for a per person limit, a per accident limit, and also, with regard to products liability bodily injury coverage, for an aggregate limit. And that I believe a factor that must be established by the plaintiff, in order to recover under this policy, that's not an exclusion by the very terms of the policy that you're seeking to recover under, that you have stipulated as an accurate specimen of the policy, the aggregate limit is set forth as a limitation of liability. Now, if there was not a blank in that policy for aggregate limits for products liability, then I think you might have a different situation. Now then, I think that you would be able to establish on the face of the policy that you came within the limits of liability that were set forth there and it would become then the defendant's responsibility to demonstrate that there were aggregate limits of liability that also applied. But you are faced with a contract which sets forth that it will pay within the limits of liability of the policy, and then the limits of liability are very clearly defined and set forth in paragraph Roman 4 of that policy. And I don't know how we can call that an exclusion.

It appears also that the cases cited by the defendant are stronger. The Keene case flat out indicates that the person asserting the right to recovery under a lost insurance policy has the obligation of establishing by clear and convincing evidence the aggregate limits that were involved. And the UNR case, as well, supports that proposition.

So, for those reasons, I believe that the burden is on the plaintiff, where plaintiff seeks to recover under a written contract of insurance, written contracts of insurance that have been lost, and now the plaintiff has the burden of proving plaintiff's right to recover, the law of Pennsylvania, the law of New Jersey,

whichever you choose, both agree that under those circumstances the person asserting the right to recover has the obligation to prove every element necessary to the right to recover, and to prove that by evidence that is clear and convincing.

For those reasons, the Court will submit the interrogatory to the jury as we have indicated — have you passed those out to counsel?

THE CLERK: I gave them copies, yes.

THE COURT: Now, is that form — are those forms of interrogatories satisfactory? I understand that you believe there should be one, Mr. Kane, and you believe that it should be phrased another way with regard to burden of proof, but we do not mention the standard of proof in the question. But is that question — are those questions —

MR. KANE: We think this is acceptable, but, obviously, depends on what the standard is.

THE COURT: All right.

THE COURT: Mr. Seymour?

MR. SEYMOUR: As I indicated, given the Court's ruling on the law, I think this is a satisfactory way to present the special verdict to the jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

H. K. PORTER COMPANY, INC., a corporation, *Plaintiff,* v. TRANSAMERICA INSURANCE COMPANY, a corporation, *Defendant.*	Civil Action No. 84-442

SPECIAL VERDICT

1. Do you find that the insurance policy LB-1729 did not contain an aggregate limitation of liability for bodily injury products liability claims?

Yes _____ No ___X___

2. Do you find that the insurance policy LAB-1124 did not contain an aggregate limitation of liability for bodily injury products liability claims?

Yes _____ No ___X___

DATED this 22nd day of February, 1989.

/s/ Gayle C. Toth

/s/ Frank Vallecorse

/s/ Robert Fitzgerald

/s/ Jacob Casper

/s/ Gail Hiney

/s/ Patricia A. Frank

GREENE TWEED & COMPANY, *Appellant* v. THE HARTFORD INSURANCE COMPANY, *Appellee*	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2953 Philadelphia 1987

Appeal from Order Entered October 5, 1987, in the Court of Common Pleas of Montgomery County, Civil No. 82-11337

GREENE TWEED & COMPANY v. THE HARTFORD INSURANCE COMPANY APPEAL OF: DIANE BELL	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3098 Philadelphia 1987

Appeal from Order Entered October 5, 1987, in the Court of Common Pleas of Montgomery County, Civil No. 82-11337

BEFORE: CAVANAUGH, OLSZEWSKI, and MELINSON, JJ.

MEMORANDUM:

This is an appeal from the trial court's order dismissing appellant's exceptions to the trial court's entry of declaratory judgment in favor of appellee. Appellant raises one issue on this appeal: whether the trial court erred by issuing a declaratory judgment and dismissing appellant's complaint on the basis that appellant failed to prove an entitlement to coverage for the period 1947 through 1958 under policies of insurance written by appellee. We find appellant's contention to be meritless; accordingly, the order of the trial court is affirmed.

On November 20, 1979, a summons in trespass and assumpsit was issued by the trial court in the case of *John W. Bell, Jr. and Diane B. Bell, his wife v. Greene, Tweed & Co., Inc.* Subsequently, on November 6, 1980, Diane B. Bell filed a complaint against Greene, Tweed & Co., Inc. (Greene, Tweed) on her own behalf and as executrix of the estate of her late husband. Bell asserted that her husband was an electrician performing repairs at the Greene, Tweed plant from 1947 to 1950 and 1953 to 1958; and that during this time, he was exposed to asbestos, which subsequently resulted in his death. Greene, Tweed turned the matter over its insurance carrier, Hartford Insurance Co., which in turn referred the matter to its attorney. Hartford's attorney entered his appearance on behalf of Greene, Tweed in the *Bell v. Greene, Tweed* action. On January 23, 1981, Hartford's counsel withdrew his appearance on behalf of Greene, Tweed on the basis that Hartford had no record of coverage for Greene, Tweed for the periods of 1947 to 1950 and 1953 to 1958. On July 19, 1982, Greene, Tweed filed an action for declaratory judgment in the case of *Greene, Tweed & Co. Inc., v. The Hartford Ins. Co.*, seeking declaratory relief in the nature of a finding that Hartford issued insurance policies for the years 1947 to 1958 which would have provided coverage, or at least a defense, in the *Bell v. Greene, Tweed* action. The trial court entered a declaratory judgment finding that Greene, Tweed failed to meet its burden of proving the existence of insurance policies for the years 1947 through 1958. Greene, Tweed's exceptions to the declaratory judgment were dismissed by the trial court sitting *en banc*. This timely appeal followed.

In *Supp v. Erie Insurance Exchange*, 330 Pa.Super. 542, 479 A.2d 1037 (1984), this Court explained our standard of review in appeal from a declaratory judgment:

Because a declaratory judgment action follows "as nearly as may be" the practice and procedure in an action in equity, Pa.R.C.P. No. 1601(a), we will review the determination of the trial court as we would a decree in equity. Our scope of review is narrow.

> A chancellor's findings of fact, when approved by the court *en banc*, have the force and effect of a jury verdict and will not be disturbed on appeal if supported by adequate evidence. *Herwood v. Herwood*, 461 Pa. 322, 336 A.2d 306 (1975). However, the chancellor's inferences and conclusions, which are drawn from the facts, and the application of the law are always subject to review. *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 453 Pa. 60, 311 A.2d 634 (1973), *cert. denied*, 414 U.S. 1131, 94 S.Ct. 870, 378 L.Ed.2d 755 (1974).

McDole v. Duquesne Brewing Co. of Pittsburgh, 281 Pa.Super. 78, 83, 421 A.2d 1155, 1158 (1980) (quotations and citation emitted)

Id. at , 479 A.2d at 1038. Instantly, we find that the record supports the trial court's findings of fact and that the trial court's conclusions of law are correct.

Greene, Tweed commenced this declaratory judgment action against Hartford to establish the existence of insurance policies issued by Hartford for the years 1947 through 1958 which would provide coverage, or at least a defense, for Greene,

Tweed in the case *Bell v. Greene, Tweed*.[1] The parties stipulated and, accordingly, the trial court found that a thorough search for the policies was made and that no policies for the years 1947 through 1958 could be located. In *Hacker v. Price*, 166 Pa.Super. 404, 71 A.2d 851 (1950), this Court explained:

> To recover on an instrument, the original of which has been lost, the burden of proving the loss of the original and that a diligent, bona fide and thorough search was made without success is upon the one offering secondary evidence. *Emig v. Diehl*, 76 Pa. 359; *Irwin v. Irwin*, 34 Pa. 525; *Laubach v. Meyers*, 147 Pa. 447, 23 A. 765. He is also required to prove its former existence, execution, delivery and contents. The evidence to sustain these averments must be clear and convincing. *Mahoney v. Collman*, 293 Pa. 478, 143 A. 186; 4 Wigmore, Evidence, 3d Ed., § 1194, p. 337. Whether the party offering secondary evidence has met this burden of proof successfully is a matter to be determined by the trial court and rests largely in the court's discretion which will not be disturbed on appeal unless there is a manifest abuse thereof. *Gorgas v. Hertz*, 150 Pa. 538, 540, 24 A. 756; *Muncey v. Pullman, Taxi Service Co.*, 269 Pa. 97, 112 A. 30.

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[1] At the time the declaratory judgment was being decided by the trial court, the underlying action, *Bell v. Greene, Tweed*, was awaiting trial in the Court of Common Pleas of Montgomery County. The parties to the action in *Bell v. Greene, Tweed* have since reached a settlement. The issue before this Court, however, is not rendered moot by that settlement. While it is no longer possible for Hartford to be required to defend the action in *Bell*, other claims of Greene, Tweed remain in dispute. The right to claim indemnity for the loss Greene, Tweed sustained in the *Bell* case still exists, as does the right to claim reimbursement for the sums paid by Greene, Tweed for counsel fees in defending the *Bell* action.

Id. at , 71 A.2d at 853. The trial court considered the deposition testimony of Leslie Bruchs, a retired insurance broker who serviced Greene, Tweed's insurance account; Walter Josephson, the retired executive vice-president of Greene, Tweed; and Ernest Fuchs, the retired assistant secretary and assistant treasurer of Greene, Tweed. In addition, the trial court looked at documents indicating that Hartford provided worker's compensation insurance for Greene, Tweed at least as early as 1951 and through the 1960's and that Hartford issued policies of general liability insurance to Greene, Tweed for the years 1966 through 1976. The trial court found that Greene, Tweed's proof of the existence of the disputed policies did not rise to the level of clear and convincing evidence. Moreover, the trial court explained that "even if we were to find that there was clear and convincing evidence that Hartford issued liability insurance policies to Greene, Tweed from 1947 through 1958, there is no evidence from which we can ascertain the terms of the coverage, or whether there are applicable exclusions." Trial court opinion at 12. Accordingly, we find that the trial court did not abuse its discretion by concluding that Greene, Tweed failed to meet its burden of proof.

Order affirmed.